

COAL ENERGY, INC.
v.
OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT

IBLA 90-287

Decided jUNE 27, 1990

Appeal from a decision of Administrative Law Judge David Torbett sustaining Notice of Violation No. 88-92-82-10, and violations 1 and 2 of Notice of Violation No. 88-91-092-005, and vacating violation 3 of that Notice of Violation. Hearings Division Docket Nos. NX 88-50-R and NX 88-51-R.

Appeal dismissed.

1. Surface Mining Control and Reclamation Act of 1977: Administrative Procedure: Generally--Surface Mining Control and Reclamation Act of 1977: Appeals: Generally

Departmental regulation 43 CFR 4.1273 provides that an appellant's brief is due within 30 days of the filing of a notice of appeal and that failure to file a timely brief subjects the appeal to summary dismissal. However, the failure to file a brief is not fatal if the notice of appeal contains sufficient grounds to support an appeal.

2. Surface Mining Control and Reclamation Act of 1977: Administrative Procedure: Generally--Surface Mining Control and Reclamation Act of 1977: Appeals: Generally

Where an appellant fails to appear at a hearing and an Administrative Law Judge issues a decision sustaining an NOV, the Board will not order a new hearing and the appeal will be dismissed if the appellant's notice of appeal or brief fails to state why the NOV should not be sustained.

APPEARANCES: James Lowe, Kingston, Tennessee, for appellant.

OPINION BY ADMINISTRATIVE JUDGE BYRNES

Coal Energy, Inc., has appealed from the February 6, 1990, decision by Administrative Law Judge David Torbett vacating violation No. 3 of Notice of Violation (NOV) No. 88-91-092-005 and sustaining violations 1 and 2 of

that NOV. The Judge also sustained NOV No. 88-91-82-10. The cited violations concerned appellant's failure to construct and maintain diversion ditches; failure to maintain an access road with a durable non-toxic surface and provide proper drainage for the road; and for failure to establish a diverse, effective, permanent vegetative cover. Appellant was also cited for failure to meet an effluent limitation for discharge from a basin.

Judge Torbett stated that the hearing for these violations was set for April 25, 1989, but that Mr. Lowe's wife called the Judge's office that day to notify him that Lowe would not be present due to back pains. Finding that Lowe "has failed to appear without setting out good cause before the hearing" (Tr. 5), Judge Torbett proceeded to review the testimony put on by the Office of Surface Mining Reclamation and Enforcement (OSMRE). That same day, Judge Torbett issued a letter notifying Mr. Lowe as follows:

If you desire to reopen this matter, you must file a written motion, setting out a legally sufficient reason why you did not appear at this hearing. Further, as your pleadings filed in these cases do not set out any factual basis on which you might prevail, I will not reopen them unless you file in affidavit form sufficient factual information, which, if true, would provide a defense for you in these cases. If I do not hear from you within 30 days of your receipt of this letter, I will proceed to decide these cases based upon the facts presented in the hearing, which was conducted this morning.

Appellant made no response to this letter, and Judge Torbett issued the decision from which this appeal is taken.

[1] The appeal in this case was filed pursuant to 43 CFR 4.1271(a). Departmental regulation 43 CFR 4.1273 required appellant to submit a brief within 30 days of the filing of the notice of appeal and provides that if an appellant fails to file a timely brief, the appeal may be subject to summary dismissal. Although this appeal may be subject to dismissal because appellant filed no brief, the Board has held that the failure to file a brief is not fatal where the notice of appeal contains sufficient grounds to support an appeal. Livesay v. OSMRE, 112 IBLA 137 (1989). Therefore, in this case we must examine those allegations which appellant included in his notice of appeal to ascertain whether they support his appeal.

The regulations require that "[a]n appellant shall state specifically the rulings to which there is an objection, the reasons for such objections, and the relief requested." 43 CFR 4.1273(c). That same regulation provides that failure to specify a ruling as objectionable may be considered a waiver of objection. See Donaldson Creek Mining Co. v. OSMRE, 111 IBLA 289, 296 (1989). In his notice of appeal, appellant first complains that it has taken over a year to receive a hearing whenever he has requested temporary relief. Appellant then explains his failure to appear:

The night before the hearings, I experienced severe back pain. I have had a long history of back problems, because of my being hurt many years ago in the mines. I have been under a doctor's

care for years and even had surgery. I cannot afford to go to the doctor each and every time that I have severe back, if I did I would have to camp out at his door step. There was no way to know ahead [of] time that I would once again be problemated with it.

If granted an Appeal I will show that Inspector Loise Oswalt, has intentionally caused me undue problems and that he lets his personal feelings get in the way of his job.

All that I'm asking is for a chance to get the facts out into the opening.

The hearing in the case under appeal was provided to give appellant the opportunity to dispute the charges set forth in the NOV's, not for the presentation of more general complaints against OSMRE. ^{1/} In United States v. Koenig, 99 IBLA 397 (1987), we held that a new hearing will not be ordered where a party has failed to appear at the original hearing and has provided no evidence that a further hearing would produce a different result. See also United States v. Orme, 57 IBLA 373 (1981); United States v. Franklin, 45 IBLA 54 (1980). In Firchau Mining, Inc. v. OSMRE, 101 IBLA 144, 150 (1988), we held that no hearing is necessary where the pleadings disclose no material issue of fact in dispute.

[2] Although appellant attempts to explain why he did not appear at the hearing, nothing in his notice of appeal satisfies the requirement for a brief. Other than requesting a new hearing, appellant's notice does not specify any ruling in Judge Torbett's decision to which appellant has an objection. We note that Judge Torbett provided appellant an opportunity to have the matter reopened if appellant offered some assurance that he could rebut the charges, but appellant failed to take advantage of that opportunity. Appellant's failure to indicate which ruling was objection-able as required by 43 CFR 4.1273 precludes us from treating his notice of appeal as meeting the requirement of a brief.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the appeal is dismissed.

James L. Byrnes
Administrative Judge

I concur:

Franklin D. Arness
Administrative Judge

^{1/} We note that only one of the NOV's was issued by Loise Oswalt and that appellant does not deny the violation itself.

